SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 162

HOMER GLEN WILCOX,

Petitioner,

vs.

LT. GEN. J. L. DEWITT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO BRIEF IN OPPOSITION TO THE PETITION

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INDEX

Citations

Cases:

Miscellaneous:

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Petitioner and the American Civil Liberties Union as *amicus curiae* submit this reply to the brief in opposition to the petition for certiorari, because of their belief that certain statements in respondent's brief are misleading and obfuscate the public importance of the grant of the petition.

IMPORTANCE OF INSTANT CASE AS PRECEDENT

Respondent's statement that this case is *sui generis* (Respondent's Brief, p. 14) is erroneous. In point of fact,

the case of *Zimmerman* v. *Poindexter*, No. 730, District Court for Hawaii, awaiting trial before a three-judge court, is an action for damages based on the military's expulsion of a citizen from Hawaii involving substantially the same issues as those herein. Half a dozen similar suits are pending in Hawaii. And in view of the number of other citizens subjected to individual exclusion orders, which is known to be large though the exact total remains a "military secret," the issues of the instant case affect the rights of a substantial group; there is no basis for respondent's speculation that none of its members will attempt to secure redress.

Moreover, we believe that the importance of the grant of this petition, from the standpoint of its status in relation to the administration and development of legal principles, involves a larger question than the mere prosecution of suits arising from the program under consideration in the instant case. For the issuance of individual civilian exclusion orders was a wide-spread and well-established institution, the validity of which has not heretofore been determined by the higher courts.[1] Unless judicially dis-

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[1] There is reason to believe that one cause for the lack of such determinations was the military's desire, partly perhaps because of doubts voiced by the Attorney General as to the constitutionality of the Exclusion Orders (R. 108), to prevent scrutiny and possible judicial criticism of the program by a higher court. The order against petitioner herein was revoked while an appeal to the Circuit Court was pending in an earlier suit for an injunction, thus rendering the appeal moot. (See note 8, *infra*, for further discussion of the mooting of the appeal.) In *Labedz* v. *Kramer*, 55 Fed. Supp. 25 (D. Ore. 1944) the Exclusion Order was also revoked, after a District Court decision which denied an injunction but was critical of the program. In *Alexander* v. *Emmons, et al., No. 3218, So. Dist. Cal.*, the exclusion order was revoked after the filing of a second complaint for an injunction subsequent to dismissal of a first complaint on procedural grounds (*Alexander* v. *De Witt*, 141 F. (2d) 573, C. C. A. 9th, 1944).

Schueller v. *Drum*, 51 Fed. Supp. 383 (E. D. Pa. 1943); *Scherzberg* v. *Maderia*, 57 Fed. Supp. 42 (E. D. Pa. 1944); and *Ebel* v. *Drum*, 52 Fed. Supp. 189 (D. Mass. 1943) were all decisions invalidating exclusion orders. None was appealed. An allegation that the military's handling of these three cases was merely a *bona fide* response to a changing military

approved, the existence of this institution establishes a social precedent; and here, in addition to the precedent of conduct, a legal precedent has been established in that the most authoritative opinion that has been rendered on this program is that of the Circuit Court in the instant case. Thus we believe this case warrants this Court's consideration, because the precedents here involved—the minimum procedural requirements for the issuance of orders drastically curtailing individual liberty, the minimum basis for a finding against an individual as to loyalty and for an order with the purpose and effect of suppressing the expression of opinion, the use of military force to enforce an order, the permissible scope of a delegation of legislative power—can hardly fail to be highly significant in the event of war or any serious emergency.

The precedent created by the individual exclusion program and the Circuit Court's approval of it is of even greater gravity if the powers involved in the issuance of the Order against petitioner are viewed in their totality rather than fragmentarily. For the Order was issued and enforced under the broad and all-pervasive power, alleged by the respondent to exist under Executive Order 9066

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situation is belied by the fact that the Scherzberg Exclusion Order was continued in effect though the *Schueller* decision was not appealed. The military's mooting of cases and issues by revocation of orders, and the prevention thereby of consideration of appeals by the higher courts on doubtful questions, was part of the pattern of the military control of civilians during World War II. See Memorandum of the Government in *Duncan* v. *Kahanamoku* (United States Supreme Court, No. 791, Oct. Term, 1945) which refers to the mooting of the cases of *Ex parte Lockner* (unreported), No. H. C. 295 (D. C. Hawaii); *Ex parte Seifert* (unreported) No. H. C. 296 (D. C. Hawaii) and *Zimmerman* v. *Walker*, certiorari denied as moot, 319 U. S. 744. In the *Lockner* and *Seifert* cases, internment orders were revoked while the cases were pending in the District Court, after an opinion by that District Court in the *Zimmerman* case which was highly critical of the military; and in the *Zimmerman* case the order was revoked after petition for certiorari was filed. In *Spurlock* v. *Steer*, 324 U. S. 868, the cause was also mooted by a military order issued after petition for certiorari was filed.

and Public Law 503, of a military commander to impose any restriction having any connection with the prevention of espionage and sabotage upon any individual in any region designated a "military area," and to enforce such restriction with troops. The exercise by the military of such great power, of a scope heretofore assumed only under a declaration of martial law, without such a declaration renders partially nugatory the safeguards established by this Court with respect to martial law.

Thus, the question of whether the precedents involved in this case should or should not endure seems to us to warrant this Court's attention. It is to be recalled that a decision which has been, perhaps, of greater guidance than any other in indicating both to executive officials and the courts the limitations within which to function with respect to military power over civilians, was decided subsequent to the war which gave rise to it. *Ex parte Milligan,* 4 Wall. 2.

PETITIONER'S STANDING

Respondent attempts to disparage petitioner's standing before the Court by stating that because petitioner has waived all but $100 damages "the subject of this proceeding for damages was . . . the obtaining of abstract pronouncements from the courts as to respondent's authority" which "he (petitioner) cannot have" (Resp. Brief, p. 14).

In this argument respondent apparently has attempted to derive a superficial plausibility for his position by a half-allusion to the doctrine of justiciable controversy. There is, of course, no issue in this case as to the existence of a controversy between petitioner and respondent, the issue being as to petitioner's right to redress for the injury he undoubtedly received. The life of the controversy between petitioner and respondent, which has never before been questioned, is not affected and cannot be destroyed by

petitioner's motive in seeking an adjudication of it; and respondent's intimation that there is any legal doctrine to the contrary reflects a gross misconception of judicial functions. This Court hardly sits to line the pockets of petitioners; in considering a petition, it is not concerned with the personal gain of the petitioner but with the character and importance of the questions involved. The fact that petitioner shares this approach is not an argument against the petition.

"RATIONAL BASIS" FOR ORDER

Respondent's statement that this case in its essentials turns on a question of fact (Brief, p. 15) is untrue; the case involves, and the courts below decided, important questions other than the existence of a "rational basis" for the order. And further we believe that respondent's attempt in this manner to belittle the case is particularly misguided because the issue of "rational basis," as posed in the instant case, requires this Court's consideration. For the question of the minimum basis for a conclusion as to disloyalty is not only of concern to petitioner but is a question of current and probable future importance; and we submit that the "rational basis" test was misinterpreted by the Circuit Court, both because of the circumstances which it regarded as sufficient to supply a rational basis for the Order against petitioner, and because of its uncritical reliance on biased, expurgated, and unsupported opinions as establishing the existence of these circumstances. (See Argument in Support of Petition, pp. 21-25.) [2]

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[2] As pointed out in the argument in support of the petition (p. 27), the question is also posed of whether a mere "rational basis" would in any event be sufficient to render the Exclusion Order constitutional, in view of the fact that its purpose and effect was to suppress petitioner's expression of opinion.

As to respondent's statement that a finding as to rational basis was made in "two separate litigated proceedings" (Resp. Brief, p. 15), it is to be noted that this amounts to consideration of the issue on one occasion by a District Court (in the injunction case) and on one occasion by the Circuit Court (in the instant case); thus, the issue has been passed upon by only two lower courts, and has not been reviewed to any greater extent than is customary practice.[3]

It is an interesting commentary on respondent's procedure in issuing the exclusion orders and on his failure to formulate the basis for its issuance other than that it was "dictated by military necessity," that respondent has now changed his explanation of the grounds for the order. (See discussion in Argument in Support of Petition, p. 16, of the fact that respondent's precedure was so contrived as to hamper any attack on his judgment as arbitrary.) The District Court in the injunction suit upheld the order mainly on the basis of the General's purported belief that petitioner "had engaged in a kind of leadership which might instigate others to carry on activities which would facilitate the carrying on of espionage and sabotage" (R. 264); this view was argued to, and adopted by, the Circuit Court in the instant case (R. 337-338), and was assumed by petitioner to be the purported justification for the order (Argument in Support of Petition, pp. 25-26). Now, however, the order is deemed to have been based on "respondent's conclusion that petitioner's mental attitude was such that *he*

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[3] The relevance to any legal doctrine or to the importance of the case of the circumstances that only one point has thus far been "decided adversely to General DeWitt in the entire litigation" (Resp. Brief, p. 15) and that the General has been held in the courts below to have acted in good faith (Resp. Brief, p. 15) is not apparent to petitioner. The thought seems to be that due to these circumstances respondent should be spared the hardship of further litigation regardless of the merits of petitioner's case.

might engage in either espionage or sabotage" (italics added, Resp. Brief, p. 21).

FACTS AS TO MILITARY SITUATION

Despite respondent's statement to the contrary (Brief, p. 21-22), we fully accept, and obviously are unable to controvert, the affidavits of General Marshall and others as to the military situation in the Pacific at the time of petitioner's forcible expulsion. But there is no indication in these affidavits that there was then any danger of invasion or large-scale attack, and in view of the obvious importance to the Army's case of establishing such danger, it must be deemed admitted by inference that none existed. The distinction between the conditions which in fact existed and those which might have justified the action taken against petitioner has been discussed in our Argument, p. 30, and we again urge the importance of analyzing facts rather than using general phrases such as "vulnerability of the Pacific Coast in the face of enemy capabilities" (Resp. Brief, p. 21). The question requiring consideration is: Vulnerability to what?[4]

MOOTING OF INJUNCTION SUIT AND *RES JUDICATA*

Respondent again raises the question of *res judicata* (Brief, pp. 24-26), which had been considered by the District Court but which the Circuit Court did not decide. For the reasons we discussed above as to the importance of the precedents established by the Circuit Court's decision, it would seem to us that the petition should be granted even if there were merit in the argument of *res judicata*. In

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[4] The statement from the *Korematsu* case on which respondent relies (Brief, p. 15) is clearly *dictum*, which, according to some members of the majority, was entirely irrelevant to the determination of the case.

any event, the argument, if tenable as to any of the issues in this case, is not even alleged to apply to the highly significant issue of respondent's forcible expulsion of petitioner by the use of troops. Finally, for reasons argued fully to the Circuit Court and apparently deemed persuasive by it, we believe that the argument of *res judicata* has no merit with respect to any of the issues herein and that its application in the instant case would involve a gross denial to the petitioner of his right to recourse to the courts.

Respondent's statement that the reason for dismissal of the appeal in the injunction case was not that it was moot (Brief, p. 25), seems an attempt to confuse the history of the case. Respondent filed a motion to dismiss the appeal on the ground that it was moot because of the rescission of the exclusion order against petitioner (R. 287), and because of the motion the petitioner agreed to a stipulation as to a dismissal lest petitioner be prejudiced thereby. Now, having moved to dismiss the case as moot, and having secured its dismissal, respondent uses the argument that the case was not moot after all, an argument which he may well be estopped from using.[5] We think respondent was right the first time; it is a safe assertion that no court would hear an appeal from a judgment denying an injunction, after the thing to which the injunction was to relate had ceased to exist.[6]

When an appeal from a District Court judgment is dismissed because of mootness, that judgment does not become *res judicata*. This question was decided on facts quite

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[5] This question was not discussed in the Petition because respondent has never before advanced this argument.

[6] The cases cited by respondent (Resp. Brief, p. 25) give no indication to the contrary of this almost self-evident proposition. The decision in *Electric Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, for example, is of no aid to respondent's position. That opinion relates to appellate jurisdiction to order the reformation of a decree and is explicitly stated not to pertain to jurisdiction to consider the merits.

similar to those herein in *Gelpi* v. *Tugwell*, 123 F. (2d) 377 (C. C. A. 1st, 1941). See also *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71 (C. C. A. 3rd, 1939); *Restatement on Judgments*, Sec. 69(e) p. 317.[7]

In the instant case there are special and compelling reasons for applying this doctrine. For there is reason to believe that the exclusion order was revoked for the very purpose of mooting the appeal.[8] But, even assuming the mooting of the appeal was merely an incidental result of the revocation of the exclusion order rather than its prime purpose, the fact remains that it was due to respondent's act that petitioner was unable to exercise his right to judicial review by the higher courts of the validity of the exclusion order. The application of the principle of *res judicata* would not serve its legitimate purpose of preventing unnecessary harassment of courts and litigants, but would bar

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[7] In the *Gelpi* case a Federal employee had brought a mandamus proceeding seeking reinstatement to a public office from which she claimed to have been unlawfully removed; the writ was denied and while her appeal from this denial was still pending the question became moot by reason of the expiration of her term of office. The Circuit Court of Appeals remarked as follows (at p. 378):

> "Since the appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, the judgment will not become *res judicata* on the issues involved, in any subsequent litigation based upon a different cause of action. Appellant will be free to attack collaterally the execution order of removal . . . in a suit for salary, * * *."

[8] The notice of appeal from the District Court's denial of an injunction was filed Nov. 22, 1943 (R. 285) and reconsideration of the exclusion order was commenced in November, 1943 (R. 285). It is to be observed that the Order had stood for eleven months; that there was no provision in the procedure under which it was issued for its reconsideration after eleven months; that the appellee had been forcibly removed, allegedly because his removal was necessary, only two months before such reconsideration; and that the military situation had shown no marked change in the intervening two months. (Compare vague statement as to improvement in defense situation by Board which reconsidered Order, R. 286.) And see footnote 1, *supra*, as to the military's general conduct of litigation involving its control of civilians in World War II.

petitioner from securing the full judicial review to which he is entitled when he has succeeded in bringing an action in such form that it is beyond respondent's power to moot. From this standpoint, the issue of *res judicata* as here presented involves the issue of the availability of remedies for Government's action, and this Court's words in *Bell* v. *Hood* are apposite:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Furthermore, the dismissal of the injunction suit was stipulated, and ordered by the Circuit Court, to be "without prejudice to any new or further proceedings arising out of (petitioner's) expulsion" (R. 288-289); all of the issues raised in the injunction suit can, under the terms of this order, be raised herein. Compare *Vandalia R. R. Co.* v. *Schnuil*, 255 U. S. 113; *Baxter* v. *Buchholz-Hill Transportation Co.*, 227 U. S. 637; *Abraham* v. *Casey*, 179 U. S. 210; Freeman, *Judgments*, p. 1587, Section 754.[9]

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[9] The respondent notes that petitioner has not challenged the correctness of the findings made by the District Court in the injunction case (Resp. Brief, p. 3, note 2). While it is to be observed that petitioner had no opportunity to contest these findings because of the mooting of the appeal, nevertheless, since the facts are largely uncontroverted, petitioner concedes that these findings may, as a matter of sound judicial discretion, be adopted as the findings in the instant case. This course was adopted by the Circuit Court at the respondent's suggestion. Insofar as the District Court's conclusions, though labeled findings of fact, are in truth conclusions of law or of mixed law and fact—such as the conclusion that the procedure was reasonable—they are of course entitled to little weight on appeal.

Conclusion

Respondent's view that it is not appropriate for this Court to pass upon the issues in this case is erroneous, and the petition should be granted.

Respectfully submitted,

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